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## **BUILDING LONG-TERM STRATEGIC VALUE BY ADDRESSING BARRIERS TO FUTURE-ORIENTED LEGAL THINKING**

by

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The business environment will present diverse challenges for organizations over the next 10 years. Organizations will face growing litigation and regulatory complexity across a broad range of legal areas, including consumer protection, employee retaliation, intellectual property, and cybersecurity.<sup>1</sup> Organizations that embrace a future-oriented, proactive law perspective will stand poised to outperform their rivals through managing risk and cultivating value in an increasingly uncertain legal environment.<sup>2</sup> The generation of strategic value from a future-oriented, proactive approach to law requires integration between legal strategy and business strategy within the organization.<sup>3</sup> Unreceptive managerial viewpoints toward the strategic value of law constitute a primary factor hindering such integration. To address this encumbrance to integration, a growing need exists for techniques that will alter unreceptive managerial viewpoints toward the law.<sup>4</sup>

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The development of techniques for addressing unreceptive managerial viewpoints toward the law is an emerging area of scholarship. Legal researchers have developed an assortment of innovative frameworks that serve this purpose, including the manager's legal plan, the five pathways of legal strategy, concept-sensitive managerial analysis, legal astuteness, and the systems approach to law, business, and society.<sup>5</sup> Despite the increased growth of scholarship, however, scholars have largely failed to address methods for implementing proactive approaches within the organization. The existing literature in this area, largely dominated by an optimistic belief that proactive law frameworks are capable of easy implementation within the organization, fails to encompass the reality that efforts to enact organizational change routinely fail due to a lack of employee buy-in.<sup>6</sup> Interpersonal conflict between managers and lawyers, driven by differences in decision-making, behavior and other factors, is customary within the organization and represents a barrier to promoting proactive, future-oriented legal thinking.<sup>7</sup> As the proactive law approach invokes drastic changes to managerial viewpoints toward the strategic value of law,<sup>8</sup> any legal training efforts must also include measures to resolve the organizational conflict between managers and lawyers.

Managerial employees come to legal training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions. As participants' attitudinal viewpoints toward training affect the overall effectiveness of training programs,<sup>9</sup> any training initiatives must incorporate measures designed to promote training receptivity among participants.<sup>10</sup> The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity

among managerial participants.<sup>11</sup> A critical aspect of promoting training receptivity among participants involves building relationships between the trainers and the trainees. Trust is central to the cultivation of relationships between trainers and trainees within the learning environment.<sup>12</sup> As managerial participants may come to legal training with feelings of mistrust toward legal trainers, it is critical to address the question: How to build relationships and promote trust between company managers and in-house counsel? The purpose of this article is to identify team building, reflection, and other rapport building exercises organizations may use to support training programs designed to encourage managerial embrace of proactive, future-oriented legal thinking.

## BENEFITS OF A PROACTIVE APPROACH TO LAW

Changes in the modern business environment have driven the need for new perspectives on the benefits of legal strategy to business success. Due to growing hypercompetition in the business environment, increases to litigation, growing complexity in legal regulation, globalization, and other factors, there is a greater need for integrating legal strategy with organizational efforts to obtain competitive advantage.<sup>13</sup> Organizations that adapt to the systemic, substantive, and enforcement flexibilities within all legal systems will stand in a better position to outperform their rivals.<sup>14</sup> Law affects each of the activities in the value chain (warranties, sales, manufacturing, distribution, design), as well as each of the forces that delineate enterprise attractiveness in the eyes of customers (buyer power, supplier power, threat of rivals, threat of new entrants, substitute availability).<sup>15</sup> Proactive law encompasses a growing area of scholarship focused on developing new perspectives on the connections between the value chain, enterprise attractiveness, and legal strategy.

A unique set of future-oriented operating principles and characteristics drive the application of proactive law. Proactive law encompasses the use of law as an empowering mechanism to foster relationships, cultivate value, and manage future risk.<sup>16</sup> The principles of proactive law center on two core areas: (a) skills, knowledge, and practices that promote the identification of prospective legal problems in sufficient time to take preventive action; and (b) the identification of business opportunities in sufficient time to exploit conceivable benefits.<sup>17</sup> Proactive law principles have also supported in-house legal departments in transitioning from reactive legal departments to proactive legal departments.<sup>18</sup> Reactive legal departments habitually function in crisis/firefighter mode by reacting to events as they occur, dramatically reducing their capacities to systemically identify future business risks.<sup>19</sup> Proactive legal departments, by contrast, promote behaviors and procedures necessary for more expedient responses to emerging business issues.<sup>20</sup> Proactive law moves beyond legal problem prevention considerations to supporting organizational competitive strategy through the integration of future-oriented, proactive law principles into the company's guiding policies and action plans.<sup>21</sup>

Proactive law, by encouraging managers to embrace proactive perceptions toward law and legal strategy, provides a foundation for organizations to reframe legal problems as business opportunities and to develop new options for value creation.<sup>22</sup> In the area of product liability, for example, a proactive view toward legal strategy supports the generation of new product ideas and customer value.<sup>23</sup> Organizations may draw critical information relative to new product or service opportunities for themselves, or their industries, through the information provided by customer complaints, warranty claims, and lawsuits.<sup>24</sup> A proactive commitment to sustainable development in response to increased environmental regulation

may lead to cost reductions and increased revenue through the redesign of an organization's processes, products, or business models.<sup>25</sup> A proactive approach to contracting supports organizational efforts to fuse project management, risk prevention, relationship management, and value creation into daily business practices.<sup>26</sup>

The proactive law approach represents a change from traditional organizational viewpoints toward the strategic value of law and legal strategy. Managers routinely view the law and the legal department as constraints on organizational growth.<sup>27</sup> Depending on the level to which proactive law advocates seek to integrate proactive law principles with organizational processes and practices, the level of proposed change within the organization may range from minor to substantial. Attempts to enact change within an organization routinely fail as a result of anxieties and tensions that hinder employee support and adoption of the organizational change.<sup>28</sup> If proactive law proponents are to succeed in integrating proactive law principles with organizational processes and practices, they must take the factors that will support and hinder such success into account.

## ORGANIZATIONAL LEARNING

Organizational learning is critical to the integration of proactive law principles with organizational processes and practices. We adopt the definition of organizational learning provided by Schilling and Kluge, who defined it as, "an organizationally regulated collective learning process in which individual and group-based learning experiences concerning the improvement of organizational performance and/or goals are transferred into organizational routines, processes and structures, which in turn affect the future learning activities of the organization's members."<sup>29</sup> Organizational learning

encompasses four distinct processes: (1) intuiting – an individual develops new insights and ideas based on personal experiences; (2) interpreting – the individual explains his or her new insights and ideas to others and groups; (3) integrating – the others and groups develop a shared understanding of the new insights and ideas, providing the foundation for collective action; and (4) institutionalizing – application of the shared understanding to organizational rules, procedures, strategies, and systems leads to guiding the actions of all organizational members.<sup>30</sup> Given that in-house counsels' efforts to promote the application of proactive law principles within the organization center on explaining the benefits of proactive law to managerial employees, we focus on the interpreting process for the purposes of this article.

A breakdown in the interpreting process will inhibit efforts by in-house counsel to encourage the application of proactive law principles among managerial employees. Three types of barriers hinder each of the four processes to organizational learning: (a) actional-personal barriers, structural-organizational barriers, and societal-environmental barriers.<sup>31</sup> We focus on the actional-personal barriers to organizational learning for the purposes of this article, as the substantial majority of barriers to the interpreting process fall under this category. Numerous concerns relative to interpersonal relationships consume the list of actional-personal barriers to the interpretation process:<sup>32</sup>

- Conflict in relationships between innovator and group
- Lack of motivation or anxiety by group members
- Deficiency of political or social skills by innovator
- Perceived lack of advantage over existing practices
- Low trustworthiness of innovator

As discussed more fully below, actional-personal barriers to the interpreting process parallel many of the factors driving organizational conflict between managers and in-house counsel. Organizations seeking to realize competitive advantage through embracing a proactive law perspective must address this conflict.

## ORGANIZATIONAL CONFLICT

Organizational conflict is inevitable for any company. Rahim described conflict as an interactive process manifested in disagreement or incompatibility within or between social entities.<sup>33</sup> Conflict arises in a diverse array of situations, including instances where: (a) a person must perform an activity that is not linked to his/her needs; (b) a person desires or needs access to a limited resource; (c) behavioral preferences of one person are opposed to the behavioral preferences of another person; or (d) other people do not share the skills, attitudes, values, or goals that direct another person's behavior.<sup>34</sup> It is critical that organizations acknowledge the presence of conflict in the workplace and take active steps to address such conflict, especially in situations where the conflict derives from differences in work habits, personality conflicts, or observations of performance.<sup>35</sup>

There is an expectation of interpersonal conflict between managers and in-house counsel. The existing literature contains extensive scholarship reflecting managerial perceptions of apathy and condescension toward law, the regulatory system, and the legal profession. Managers often view legal regulations as restrictions on permissible activities, impairments to organizational growth, and an inevitable cost of doing business.<sup>36</sup> Managerial views of the legal system have, in turn, driven managerial views of in-house counsel.



Managerial perspectives of in-house counsel contain views that attorneys have excessive and unjustified authority over decisions affecting the employer-employee relationship, including promotions/demotions, benefits access, and terminations.<sup>37</sup> Other common opinions of in-house counsel include beliefs that lawyers are inept at formulating imaginative solutions to complex problems, are not team players, and are a necessary evil within the business environment.<sup>38</sup> Travis and Tranter argued that such perceptions stem from a cultural mistrust and a lack of regard for the legal professions.<sup>39</sup> Exaggerated, fictional depictions of attorneys as aggressive *fighters* in popular culture have cultivated impracticable expectations of attorneys in practice.<sup>40</sup> Given the numerous perspectives toward attorneys and the legal system at large, it is necessary to examine the forces driving such viewpoints in the organizational context.

Deviations in education, training, and behavior between managers and lawyers embody three of the major forces driving managerial opinions toward attorneys in the corporate setting. Individuals without a legal background often display decision-making and behavioral patterns that are significantly dissimilar from individuals with a legal background.<sup>41</sup> For instance, while managers are commonly associated with the willingness to take risks, tendencies toward risk aversion often characterize members of the legal profession.<sup>42</sup> Perceptions of risk adversity among lawyers affect perceptions of lawyers' abilities to work in teams, as they reinforce the beliefs that company lawyers are not team players.<sup>43</sup> Scholars have also examined the role of discipline-specific language in hindering effective collaboration by in-house counsel in a team setting. The inability (or unwillingness) to apprehend legalese may lead managers to ignore relevant, critical legal information in the decision-making context.<sup>44</sup> Aggravation stemming from an excessive use of legalese may result in the further exclusion of

lawyers from organizational teams through the exacerbation of cultural differences.<sup>45</sup>

Organizational conflict, regardless of the individuals or groups involved, cannot be ignored. Evading dialogue on conflict may lead to significant damage for the firm, as conflicts regularly grow absent direct action as opposed to dissolving on their own.<sup>46</sup> Confronting conflict head-on, in contrast, enables an organization to benefit from constructive conflict. Constructive conflict involves the discussion of opposing viewpoints to challenge conventional reasoning and viewpoints, detect potential threats and opportunities, and craft innovative solutions that lead to success in the marketplace.<sup>47</sup> The direct discussion of opposing viewpoints challenges employees to evaluate and reconsider their initial positions, supports inquisitiveness, stimulates the exchange of questions, and cultivates understanding of contrasting positions.<sup>48</sup> Constructive conflict enables groups comprised of diverse members to produce superior results in the decision-making process.

The connections between organizational conflict and organizational learning present a unique opportunity in the context of efforts to integrate proactive law principles with organizational processes and practices. Addressing the actional-personal barriers to organizational learning will lead to improved interpersonal relationships between managers and in-house counsel. Improved relationships between managers and in-house counsel will lead to more open-minded discussion between the two groups. Open-mindedness in the organizational context occurs when employees come together to understand each other's positions, objectively consider the reasoning for each other's positions, and attempt to assimilate their collective positions into mutually agreeable solutions.<sup>49</sup> Growth in open-minded discussion between managers and in-

house counsel will, in turn, provide an environment supportive of training initiatives designed to promote managerial support and adoption of proactive law.

## SUPPORTING TRAINING THROUGH RELATIONSHIP BUILDING

The development of a corporate environment supportive of proactive law training initiatives cannot occur without a fundamental examination of how participants approach training programs. Training represents the acquisition of knowledge, skills, and abilities that support organizational goals and objectives.<sup>50</sup> Effective training programs nurture employee readiness in ways that serve the mission, goals, and bottom lines for organizations.<sup>51</sup> The continuous development of employee knowledge and skills represents a critical element of firm performance and competitiveness.<sup>52</sup> The design of effective training programs must accompany a holistic understanding of the diverse forces that influence training effectiveness, including an examination of the processes that must occur before training sessions are delivered to employees.<sup>53</sup>

Employees approach corporate training programs in a variety of ways. Participants come to training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions.<sup>54</sup> Participants' attitudes toward training program affect their respective approaches toward the program, which then affect the training program's overall effectiveness.<sup>55</sup> As noted above, managerial attitudes toward legal training may reflect feelings of apathy, condescension, repression, mistrust, and misunderstanding.<sup>56</sup> It is therefore necessary for the training experience to incorporate measures designed to promote

training receptivity among participants, even before their exposure to course training materials.<sup>57</sup> The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity among managerial participants.<sup>58</sup>

One important aspect of promoting training receptivity among managerial participants in legal training centers on building relationships between the trainers and the trainees. As suggested by Peterson, several techniques exist for improving relationships between managers and in-house counsel: building rapport through socialization, understanding the concerns/focus/perspectives of the other, and viewing each other as valued partners.<sup>59</sup> Trust is central to cultivating relationships within the learning environment. The trainers can enhance trainees' achievement of the desired learned objectives by creating a learning environment that fosters trust between the trainers and the trainees.<sup>60</sup> As managerial participants may come to legal training with feelings of mistrust toward legal trainers, who will likely be members of the organization's legal department, it is critical to address the question: How to build relationships and promote trust between company managers and in-house counsel?

The exercises below represent just a few of the many, low-cost approaches to build relationships and promote trust between company managers and in-house counsel:

- **Marshmallow Challenge:** In the Marshmallow Challenges groups compete to build the tallest freestanding structure to support a marshmallow using limited materials while observing a set of pre-defined challenge rules. Although the materials may vary from challenge to challenge, the typical 'Marshmallow Challenge Kit' includes 20 sticks of uncooked

spaghetti, one marshmallow, one yard of string, and one yard of tape. The TED Talk video by Tom Wujec provides an excellent overview of the challenge and breakdown of it's the benefits.<sup>61</sup>

- **World Café Technique:** The World Café Technique provides a means for participants to start developing trusting relationships by supporting connection through conversations.<sup>62</sup> The technique is based on the observation that people naturally share ideas, connect with each other, and create fresh observations when in a relaxed, café type setting.<sup>63</sup> The small group atmosphere that routinely characterizes the café environment enables individuals to limit their exposure to embarrassment, shyness, and other factors that may inhibit the free sharing of conversation and ideas.<sup>64</sup>
- **Cell Phone Ringtone Discussion:** The Cell Phone Ringtone discussion is a simple icebreaker activity where participants introduce themselves by playing their cell phone ringtones for the entire group. This exercise is a useful tool to help participants start conversing and connect in a way that is not too personal or intrusive.<sup>65</sup>
- **“I AM:”** The “I AM” activity empowers participants to get to know each other beyond a work-related context and to learn how other people perceive themselves. Participants write “I am . . .” at the top of a piece of paper or index card followed by five endings to the statement that represent themselves. Participants affix the papers or cards to their shirts and spend several minutes reading each other’s statements. Once participants have had a chance to read the statements on each other’s cards, they can then branch out into discussions on the statements they found interesting. Additional versions of “I am . . .” may include “I fear. . .,” “I hope. . .,” or “I am not . . .”<sup>66</sup>

- **Cartoon Characters Exercise:** The Cartoon Characters exercise is designed to expand participants' self-awareness, to support a better understanding of their fellow participants, and to promote creativity and reduce stress through the use of humor.<sup>67</sup> For this exercise each participant selects a cartoon character with a personality trait that he or she identifies with and explains that choice to the other participants. It's important to illustrate to the participants that since cartoon characters exaggerate traits that people share, the exercise is a valuable tool for gaining perspective on themselves and those around them.

Regardless of the selected activity, it is important to remember that facilitating a team-building activity successfully involves a series of steps.<sup>68</sup>

- **Step 1 – Select relevant activity.** Begin with the objective in mind and consider whether and how the activity will support trust building.
- **Step 2 – Prepare for activity.** Obtain needed materials, set up the room, and practice facilitator's comments and actions.
- **Step 3 – Explain activity to participants.** Welcome participants with enthusiasm, explain the activity, and clarify the reasoning and benefits behind the activity.
- **Step 4 – Clarify activity.** Ensure participants understand the rules and check for questions or misunderstandings.
- **Step 5 – Conduct activity.** Encourage participants during the activity, ensure compliance with the rules, and clarify misunderstandings as needed.
- **Step 6 – Debrief participants immediately following activity.** Ask questions to help participants use what

they learned from the activity in their jobs going forward.

## CONCLUSION

Interpersonal conflict between managers and in-house counsel, a customary occurrence within organizations driven by differences in decision-making, behavior and other factors, represents a barrier to promoting proactive, future-oriented legal thinking. As the proactive approach to law may require drastic changes to managerial viewpoints toward the strategic value of law, legal training efforts must include measures to resolve the organizational conflict between managers and in-house counsel. Managerial employees come to legal training programs with unique attitudinal viewpoints stemming from dissimilar goals, opinions, biases, expectations, and preconceived notions about the value they will derive from the training sessions. As participants' attitudinal viewpoints toward training affect the overall effectiveness of training programs, any training initiatives must incorporate measures designed to promote training receptivity among participants. The reduction of anxieties relative to participation in the training process represents a critical measure for enhancing training receptivity among managerial participants. A critical aspect of promoting training receptivity among participants involves building relationships between the trainers and the trainees. Team building, reflection, and other rapport building exercises will support the cultivation of relationships between legal trainers and managerial trainees within the learning environment, and in turn, support the managerial embrace of proactive, future-oriented legal thinking.

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<sup>18</sup> Susie Lees et al., *Stop Putting out Fires and Start Working Proactively with your Client*, 31 ACC DOCKET 73, 77 (2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Siedel & Haapio, *supra* note 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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<sup>31</sup> Schilling & Kluge, *supra* note 29.

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<sup>33</sup> Afzalur M. Rahim, *Toward a Theory of Managing Organizational Conflict*, 13(3) INT'L J. CONFLICT MGMT. 206, 206 (2002).

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<sup>35</sup> Geoffrey VanderPal & Victor Ko, *An Overview of Global Leadership: Ethics, Values, Cultural Diversity and Conflicts*, 11 J. LEADERSHIP, ACCOUNTABILITY & ETH. 166 (2014).

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- <sup>48</sup> Tjosvold et al., *supra* note 46 at 556.
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